

NO. 33303

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

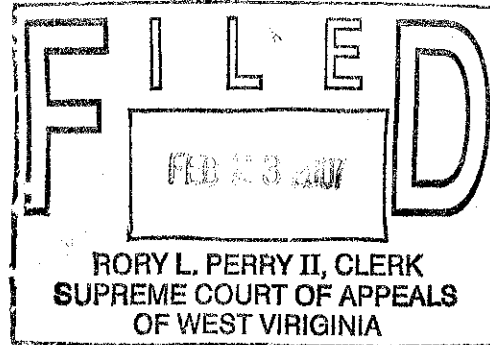
STATE OF WEST VIRGINIA *EX REL.*,
ALAN D. BAKER,

Appellant,

v.

DAVID H. BOLYARD, DIRECTOR,
DIVISION OF MOTOR VEHICLES,
STATE OF WEST VIRGINIA,

Appellee.



APPELLANTS BRIEF

Respectfully submitted,

STATE OF WEST VIRGINIA *EX REL.*,
ALAN D. BAKER

By Counsel

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THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA EX REL,
ALAN D. BAKER,**

APPELLANT;

v.

**DAVID H. BOLYARD, DIRECTOR,
DIVISION OF MOTOR VEHICLES,
STATE OF WEST VIRGINIA**

APPELLEE.

APPELLANT'S BRIEF

**THE KIND OF PROCEEDING AND THE NATURE
OF THE RULING IN THE LOWER TRIBUNAL**

This action is to appeal the revocation of the Plaintiff/Appellant's (hereinafter "Appellant") driver's license pursuant to an administrative order of the West Virginia Department of Motor Vehicles. Appellant was arrested and charged with the offense of Driving Under the Influence of Alcohol, first offense. Appellant timely requested an administrative hearing after receiving a Notice of Revocation by the West Virginia Division of Motor Vehicles (hereinafter DMV). Appellant appeared at the hearing as well as the arresting officer. Nine days later the Appellant entered a plea of nolo contendere/no contest in the Magistrate Court of Greenbrier County, West Virginia. Some time later, the Appellant received a Final Order of revocation from the DMV. The stated reason for revocation was the plea of no contest. Specifically, the final order stated

that despite the fact that a hearing had been conducted without a decision being rendered, the revocation would ensue. Appellant appealed the decision to the Circuit Court of Greenbrier County, West Virginia. The Honorable James J. Rowe denied the appeal. This Petition of Appeal follows.

STATEMENT OF THE FACTS OF THE CASE

On or about July 31, 2005, Appellant was arrested in Greenbrier County, West Virginia and subsequently charged with the offense of Driving Under the Influence of Alcohol, first offense. Appellant, thereafter on August 12, 2005, received a Notice of Revocation from the West Virginia DMV. Appellant, timely requested an administrative hearing in accordance with the provisions of West Virginia Code § 17C-5A-2. Wherein Appellant challenged the administration of the secondary breath test as well as probable cause for the initial stop. The DMV proceeded to schedule the matter for a hearing on October 17, 2005.

Appellant appeared at the Administrative hearing as did the arresting officer. Testimony was taken and Appellant, at the close evidence moved that the matter be dismissed due to various insufficiencies in the evidence as presented. The hearing was then concluded.

On or about October 26, 2005, some nine days following the DMV Administrative hearing, Appellant appeared in the Magistrate Court of Greenbrier County, West Virginia, wherein, following plea discussions, he entered a plea of no contest to Driving Under the Influence of Alcohol first offense. At this time Appellant has not received the Administrative Hearing decision.

On or about December 9, 2005, Appellant received a Final Order of revocation (attached as Exhibit A) from the West Virginia DMV, wherein, he was advised that his privilege to operate a motor vehicle was revoked for a period of six months. The stated reason was that the DMV had received notice of Appellant's no contest plea from the magistrate court of Greenbrier County, West Virginia.

The Order of Revocation went on to state that even if Appellant had already had an administrative hearing but no decision rendered that this notification alone constituted sufficient evidence to uphold the previous Order of Revocation.

Appellant appealed the final order. The Honorable Judge James J. Rowe denied the petition and remanded to the DMV on February 27, 2006. The DMV again refused to grant the Appellant a re-hearing; thereafter the Appellant filed a petition for contempt with the Circuit Court of Greenbrier County. The Honorable James J. Rowe denied the petition, however he granted a stay of the revocation pending the Appellant's appeal.

**THE ASSIGNMENTS OF ERROR RELIED UPON ON
APPEAL, AND THE MANNER IN WHICH THEY
WERE DECIDED IN THE LOWER COURT**

1. WHETHER THE TRIAL COURT ERRED IN NOT REVERSING THE DIVISION OF MOTOR VEHICLES DECISION TO SUSPEND THE APPELLANT'S LICENSE?
2. WHETHER THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE ARBITRARY AND CAPRICIOUS ACTIONS OF THE APPELLEES?
3. WHETHER A PLEA OF "NO CONTEST" IS A CONVICTION AS DEFINED IN WEST VIRGINIA CODE §17C-5a-1a?

**POINTS OF AUTHORITIES RELIED UPON,
A DISCUSSION OF LAW AND RELIEF PRAYED FOR**

Appellant submits that the applicable standard of review in this case is de novo inasmuch as the issues herein pertain to questions of Law and interpretation of a statute. Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 WV 138 (1995).

The threshold inquiry in this matter is whether "substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions, decision or order is 1) In violation of constitutional or statutory provisions; or 2) In excess of the statutory authority or jurisdiction of the agency; or 3) Made upon unlawful procedures; or 4) Affected by other error of law; or 5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or 6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Ruby v. Insurance comm'n, 197 W. Va. 27 (1996).

Here, Appellant asserts that numerous and substantial rights have been violated by the Division's Order. The law in this matter is clear. The Divisions's decision is clearly in violation of Constitutional or Statutory provisions and is in excess of the Statutory authority or jurisdiction of the Agency; made upon unlawful procedures; affected by other error of law; and is arbitrary and capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion.

1. Whether a Plea of "No Contest" is A Conviction as Defined in WV Code §17C-5a-1a

To begin with, it is well settled that a plea of no contest cannot be admitted against a Defendant in any civil or criminal proceeding. University of West Virginia Board of Trustees ex rel. West Virginia University v. Fox, 197 W. Va. 91, 475 S.E.2d. 91 (1996).

Rule 410(2) of the West Virginia Rules of Evidence also specifically prohibits the admission into evidence of any no contest plea. Furthermore, West Virginia Code § 17C-5A-1a(e), specifically, defines a "conviction" for purposes of revocation proceedings, as "when a person enters a plea of guilty or is found guilty." The West Virginia Supreme Court has also held in Mullen v. Division of Motor Vehicles, 613 S.E.2d. 98 (2005) that criminal proceedings are not dispositive of the administrative license revocation proceedings.

It is further well-settled law that a statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts, but will be given full force and effect. Syl. Pt. 2 State v. Epperly, 135 WV 877 (1951), cited in Crouch v. WV Division of Motor Vehicles, No. 32843 (2006). Here, West Virginia Code § 17c-5a-1a(e) is clear and unambiguous and plainly expresses the legislative intent for purposes of administrative revocations that a person is "convicted" when the person enters a plea of guilty or is found guilty by a court or jury. If the legislative intent was to include no contest pleas in the definition of "conviction" the statute would so state.

The time honored Maxim of statutory interpretation *Expressio unius est exclusio alterius* informs us that the mention of one thing implies exclusion of another. Clearly, the legislative intent as expressed in 17C-5A-1a is that a plea of no contest is NOT a conviction for purposes of either 17B-3-5 or 17B-3-6.

The Appellee relies heavily on State ex rel. Stump v. Johnson, 217 W.Va. 733, 619 S.E.2d 246(2005) to support its position that the Appellants's plea fell within a "window" created by the ruling in Stump. What Appellee fails to take into consideration is that the Stump decision never specifically makes a ruling as to the question Appellant raises in his appeal. More specifically, the decision never fully addresses the issue as to whether a plea of "nolo contendere" is the same as a plea of "guilty" as provided in West Virginia Code § 17-C-5A-1a. Furthermore, the Stump decision never specifically overruled any previous case law or Code sections. Appellant fails to see the tenuous connection the Appellee has made between Stump and the present proceedings.

Moreover, without specifically addressing or overruling a particularized issue, what the Appellee relies so adamantly on can only be accurately described as "dicta" buried in a jurisdiction discussion. The Respondent has made a huge "leap of faith" by clinging tenaciously to the mere wording of Stump without the language to solidify their standing. Further, the Respondent relies on Justice Benjamin's concurring opinion in David v. Commissioner of West Virginia Div. Of Motor Vehicles, 2006 WL 1312089 (W. Va. 2006). While Justice Benjamin's concurring opinion is informative, it must be pointed out that it is only a concurring opinion and is therefore merely persuasive in nature and not binding to this or any other case.

Appellee, took the position following the Stump decision that anything short of a finding of "not guilty" or an outright dismissal of the ancillary criminal charge gave them free reign to revoke a person's drivers' license without the benefit of an administrative hearing. This position is clearly wrong and represents an unconstitutional usurpation of both legislative and judicial authority.

Therefore, the Division's order revoking Appellant's license solely because of Appellant's entering a no contest plea is clearly in violation of Constitutional and Statutory provisions, it is in

excess of the Statutory authority and jurisdiction of the Division; it was made upon unlawful procedures and it is arbitrary and capricious.

2. Whether Appellants' Due Process Rights were Violated by Appellees' Actions

Appellants other assertion is that Appellees' actions have violated his Due Process rights.

It is established that a drivers license is a property interest and such interest is entitled to protection under the Due Process clause of the West Virginia Constitution. Syl. Pt 1 Abshire v. Cline, 193 WV 180 (1995); cited in Petry v. Stump No. 32886, 2006.

Furthermore, this court has held that under West Virginia Constitution art. III, §; 10, which provides that "No person shall be deprived of life, liberty, or property, without Due Process of law ...; and under West Virginia Constitution art. III, §; 17, which provides that "justice shall be administered without ... delay," administrative agencies performing, quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted.. Syl. Pt. 7, Allen v. State Human Rights Commission, 174 WV 139, 324 S.E.2d 99 (1984).

Our Legislative, following constitutional mandates and Legal Precedent, enacted various statutes and rules to ensure that Due Process is afforded in the realm of License Revocation Proceedings.

Specifically, Title 91 of the West Virginia Code of State Regulations sets forth the Legislative Rules for the DMV. Specifically, Rules 3.12.1 and 3.12.2 discuss Administrative Hearings. Rule 3.12.1 states: "The commissioner shall make findings of fact and conclusions of law pursuant to West Virginia Code §29A-5-1 et seq. and the applicable statutory provisions." Rule 3.12.2 states: "Shall make and enter a Final Order pursuant to West Virginia Code §29A-5-1

et seq. and the applicable statutory provisions." In this case the Appellee arbitrarily decided it did not have to comply with the foregoing mandates.

WV Code 17B-3-5 provides for mandatory revocation of an operator's license upon receipt of a record of conviction of a specified offense when that conviction has become final. West Virginia Code 17B-3-6 on the other hand provides for discretionary suspension where there is evidence that a licensee has committed a specified offense (i.e. pre-conviction suspension). While further priority that an administrative hearing upon proper request after which the suspension may be recorded, extended or changed to a revocation. However, West Virginia Code 17C-5-A-1a specifically states that a person is "convicted" when the person either enters a plea of guilty or is found guilty.

Here, Appellee asserts that Appellants' revocation was proper pursuant to §17B-3-5 when this is not factually or legally accurate.

This court has addressed the Due Process issue herein raised in many earlier cases. Specifically, this court found that the Administrative Proceedings for suspension of a drivers' license under West Virginia Code §17C-5A-1 et. seq. afford Due Process protection. The court reached this conclusion after listing the specific Due Process protections given pursuant to West Virginia Code §§17C-5-4, 29A-5-1 et seq., and §17C-5-a-1 et seq. including the requirement of an impartially conducted hearing pursuant to 29-A-5-1(d).

The foregoing decision presupposes that a party is actually afforded the enumerated protections. Here, Appellant clearly has not been afforded these protections due to the arbitrary and capricious actions of Appellee.

Here, the Division's Order is a clear violation of Petitioner's Due Process rights as guaranteed under both the State and Federal Constitutions inasmuch as the Division is totally

disregarding the fact that a hearing was held pursuant to the provisions of West Virginia Code § 17C-5A-2(a). The statute further requires that the Commissioner make specific findings at such Administrative Hearing. In this case no findings from the hearing were made by the Commissioner as required. Furthermore, Appellee did not even follow its own rules as promulgated in Title 91 of the West Virginia Code of State Regulations.

Here, Appellant was initially given a hearing as requested pursuant to West Virginia Code §17C-5A-1a. However, Appellee arbitrarily and capriciously disregarded the hearing and proceeded to revoke Appellant's license prior to the decision being rendered as required by the statute and the rules.

Moreover, although there have been no legislative changes effecting the nature of the DMV's ruling, there has been a legislative rule adopted and authorized by the West Virginia Legislature effective May 15, 2006. Rule § 91-5-14.1 specifically states "For the purposes of this rule, a plea of nolo contendere stands as neither an admission of guilt nor a conviction for administrative revocation proceedings." Rather than changing the section, this action clarified what the Legislative intent has always been, and given that no Law was changed and that Stump did not over-rule any prior case, Appellant should have been afforded Due Process and was entitled to a Revocation Hearing.

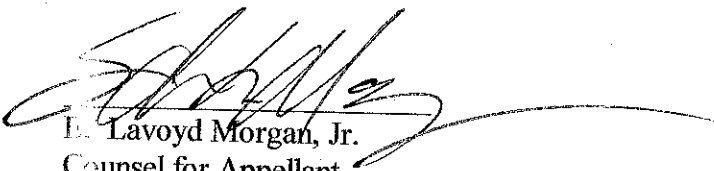
PRAYER

Therefore, based upon the fore-going, the Appellant prays that this Court reverse the judgement of the Circuit Court of Greenbrier County, West Virginia, or in the alternative, to

remand this matter to the said court, with instructions to enter judgement in favor of the Appellant.

Respectfully submitted.

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BY COUNSEL



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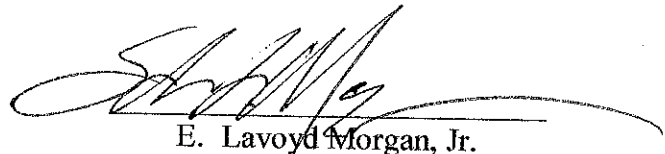
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DIVISION OF MOTOR VEHICLES,
STATE OF WEST VIRGINIA,

Appellee.

CERTIFICATE OF SERVICE

I, E. Lavoyd Morgan, Jr., Counsel for Appellant, do hereby certify that the foregoing *Appellants Brief* was served upon the opposing part by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 23rd day of February, 2007, addressed as follows:

Janet E. James
Assistant Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, WV 25305



E. Lavoyd Morgan, Jr.